Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

v.

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that, on a motion to dismiss for alleged spoliation of evidence where the facts are in dispute and the credibility of witnesses is an issue, an evidentiary hearing be conducted before dismissing viable claims of $50 million?

RULE 29.6 STATEMENT

None of the petitioners has a parent company and no publicly held company owns ten percent, or more, of the stock of any petitioner. The St. Paul Companies, Inc., a publicly traded company, has an indirect interest in some of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department, dated September 7, 2000.

OPINIONS BELOW

The decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department (the "First Department"), dated September 7, 2000, affirming dismissal of virtually all of petitioners' claims due to alleged spoliation, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11 (1st Dep't 2000). (*See* Appendix ("App.") at 1a-11a.) That order affirmed the February 17, 2000 decision and order of the Supreme Court of the State of New York for New York County, which is reported at N.Y. L.J., Feb. 18, 2000, at 29 (Sup. Ct. N.Y. County Feb. 17, 2000). (App. at 12a-20a.)

The decision and order of the First Department, dated June 21, 2001, upholding dismissal of petitioners' remaining claims due to the same alleged spoliation, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 284 A.D.2d 239 (1st Dep't 2001). (App. at 21a-22a.) That order affirmed the January 29, 2001 decision and order of the Supreme Court of the State of New York for New York County, which is not reported. (App. at 23a-26a.)

The order of the Court of Appeals of the State of New York dismissing petitioners' first motion for leave to appeal on the ground that the order then appealed was not final, dated September 6, 2001, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, 96 N.Y.2d 937 (2001). (App. at 27a-28a.) The order of the Court of Appeals of the State of New York denying petitioners' second motion for leave to appeal, dated January 10, 2002, is reported at *Sage Realty Corp. v. Proskauer Rose LLP*, No. 1319, 2002 N.Y. LEXIS 44 (N.Y. Jan. 10, 2002). (App. at 29a.)

STATEMENT OF JURISDICTION

The order of the Court of Appeals of the State of New York denying petitioners' second motion for leave to appeal was entered on January 10, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part, that:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Introduction

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (CA2 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)).

In resolving motions for alleged spoliation, courts consider a myriad of factual issues, including: (1) whether items were actually destroyed; (2) whether those items are relevant to the issues in the case; (3) whether the alleged spoliation prejudices the non-spoliating party in proving a

claim or defense; (4) whether the alleged destruction was done negligently, in bad faith or in some other manner; (5) whether the discarded items were material or key evidence; (6) whether the alleged spoliation was done prior to or after the contemplation of litigation; (7) whether the alleged spoliation violated a court order; (8) whether to apply the "adverse inference," or the "spoliation inference," a doctrine providing that "spoliation of evidence germane 'to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction'";[1] (9) whether to apply sanctions or other remedies; and (10) if dismissal is considered, whether any alternative less severe than dismissal should be imposed.

On a motion to dismiss due to alleged spoliation, like a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure (FED. R. CIV. P. 56 (hereinafter "FRCP")) or, as in this case, Section 3212 of New York's Civil Practice Law & Rules (N.Y. C.P.L.R. § 3212 (McKinney 1992 & Supp. 2002) (hereinafter "CPLR")), a court may: (i) decide the motion on papers alone when no disputed facts exist; or (ii) conclude that disputed facts require an evidentiary hearing before the trier of fact prior to deciding the motion; or (iii) submit the factual issues to the jury at trial. Unlike summary judgment, however, a motion to dismiss due to alleged spoliation is not subject to a federal or state counterpart to Rule 56 or CPLR 3212 requiring the court to refer any factual disputes to the trier of fact. Lacking statutes, rules, or coherent controlling case law, many courts have improperly determined issues of fact against an alleged

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1. *Byrnie v. Cromwell*, 243 F.3d 93, 107 (CA2 2001) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (CA2 1998)); *see also* RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 3-141 (11th ed. 1995 & Supp. 2000); 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 264 (5th ed. 1999).

spoliator without conducting evidentiary hearings, and/or failed to refer factual issues to the jury. Such actions are clear violations of an alleged spoliator's constitutionally protected right to due process.

There is a split of authority, and thus a clear conflict, among the circuit courts of appeals and the state courts of last resort as to whether and when a court must conduct an evidentiary hearing, rather than resolve disputed facts. *Compare Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (CA4 2001), *with Gratton v. Great Am. Communications*, 178 F.3d 1373, 1375 (CA11 1999); *compare Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1017-18 (Fla. Dist. Ct. App. 2000), *with Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988). There is also a clear conflict among these courts regarding when to apply the adverse inference and whether the court or the jury should determine the facts relating to its application. *Compare Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (CA1 1988), *on remand*, 127 F.R.D. 1 (D. Mass. 1989), *cert. denied*, 498 U.S. 891 (1990), *with Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 558-59 (CA7 2001). The case law is inconsistent and confusing, resulting in a patchwork of diverse decisions that fails to articulate any uniform standard prescribing what process is due to alleged spoliators who raise disputed facts.

This Court has never squarely addressed spoliation. (*See infra* at 11.) This case presents an excellent vehicle for this Court to provide guidance regarding due process requirements applicable to a motion to dismiss viable claims due to alleged spoliation. Review is plainly warranted because minimum standards of due process in the context of spoliation need to be, but have not yet been, defined. As a result of the recent allegations of spoliation against Arthur Andersen LLP and Enron Corporation, the scores of law suits that will assuredly be brought due to those allegations, as well as the number of other lawsuits involving similar

assertions, spoliation will confront federal and state courts across the country with increasing frequency.

B. Background

This case presents a clear and concise record that petitioners were denied due process on a motion to dismiss due to alleged spoliation.

This malpractice and breach of contract action arises out of a 1995 mortgage-backed securities and refinancing transaction involving four commercial office properties located in Manhattan. Petitioners Melvyn Kaufman, Robert Kaufman and the other petitioners (the "petitioners") retained respondent Proskauer Rose LLP ("Proskauer") as counsel and respondent Nomura Securities International, Inc. ("Nomura") as the financial advisor to handle the transaction.

Petitioners commenced their case on November 1, 1996, ultimately asserting that Proskauer: (i) failed to disclose that it was representing Nomura at the same time it was representing petitioners, thereby creating a conflict of interest; (ii) told petitioners that the land beneath the buildings, or the fee interest, was not mortgaged in the transaction documents, when in fact it was mortgaged; and (iii) negotiated refinancing terms in the mortgages which violated federal tax laws applicable to a mortgage defeasance transaction, conflicted with New York State mortgage-recording tax statutes, and otherwise did not work. Petitioners sued Nomura for failing to negotiate a deal according to the term sheet the parties signed and for failing to negotiate refinancing terms that worked.

Petitioners' claims against Proskauer and Nomura survived motions to dismiss and motions for summary judgment. At the time they were dismissed, these claims were viable and required a trial.

During discovery, petitioners produced tapes and transcripts of recordings of nineteen telephone conversations concerning the transaction. Proskauer claimed that petitioners had to have more tapes. Petitioner Melvyn Kaufman ("Mr. Kaufman") volunteered that, after he had turned over all transaction tapes to his counsel, he had discarded his remaining tapes, since they were wholly unrelated to the transaction. Respondents conducted discovery of what they deemed to be spoliation of evidence and later moved to dismiss the case due to Mr. Kaufman's discarding of these irrelevant tapes.

In support of its motion to dismiss, Proskauer submitted an affidavit of an attorney who stated that, while she was working on the transaction, she had discussed the transaction with Mr. Kaufman on the telephone and in person, but she had no knowledge of what telephone conversations were taped. Petitioners proffered Mr. Kaufman's affidavit and deposition testimony that, after litigation was contemplated, he did not discard any tapes of conversations relating to the transaction. Petitioners submitted deposition testimony of former employees that corroborated Mr. Kaufman's statements that he taped some, but not all, telephone conversations, and otherwise supported his taping practices. Nomura submitted no affidavit.

Petitioners asserted that where issues of fact had been raised as to whether spoliation occurred, testimony at a hearing or trial was required. (New York Court of Appeals Record ("N.Y.R.") at AR3787-89; AR3769-3789.) Proskauer agreed that a hearing should be held. (N.Y.R. at AR3793.)

C. The Orders Below

The supreme court refused to hold an evidentiary hearing, thereby denying petitioners their rights to due process. (N.Y.R. at AR3794-95; App. at 16a.)

On February 9, 2000, New York's supreme court dismissed petitioners' claim against Nomura, and dismissed virtually all claims against Proskauer. The supreme court did not dismiss those portions of petitioners' claims against Proskauer relating to the undisclosed conflict of interest. (App. at 19a-20a.) In its order, the supreme court held that respondents were not required to prove that the discarded tape recordings were relevant, or crucial to their defense. Instead, the court relied upon "the circumstances surrounding the destruction of those tapes" as proof that the tapes must have been relevant, even though Mr. Kaufman swore that the tapes were not relevant. (App. at 13a.)

New York's supreme court inferred: (i) that the discarded tapes contained recordings of relevant conversations relating to the transaction; and (ii) that those conversations were adverse to petitioners. (App. at 15a-17a.) This is an improper application of the spoliation inference. First, relevance must be established by independent evidence and cannot be inferred. Unless relevance is established by separate evidence, the adverse inference may not be drawn against petitioners. Second, the facts relating to the inference should have been submitted to the jury, not the court, so the jury could have determined whether the discarded tapes contained conversations that were adverse to petitioners.[2] The inference made by the court constituted fact-finding on the part of the judge, thereby denying petitioners their due process rights to have a full evidentiary hearing.[3]

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2. *See* KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.26 (5th ed. 2001 & Supp. 2002); 1 NEW YORK PATTERN JURY INSTRUCTIONS 3d 1:77, 1.77.1 (2001).

3. The New York supreme court also awarded respondents their attorneys' fees incurred on the spoliation motion. (New York Court of Appeals Appendix, at 8a-15a.) Hearings were held to determine the amount of those fees, and ultimately petitioners paid respondents approximately $1,036,000 in attorneys' fees, an unprecedented sum.

The supreme court made findings of fact and weighed credibility by rejecting, without reason, Mr. Kaufman's affidavit and his deposition testimony. Quoting a First Department decision in which the court denied a request for a hearing despite the existence of disputed facts, the New York supreme court explicitly held that petitioners "were not entitled to a fact-finding hearing to determine the nature of [the] documents they wrongfully discarded." (App. at 16a (quoting *Sonmez v. World on Columbus, Inc.*, 689 N.Y.S.2d 505, 506 (1st Dep't 1999)).) This denial of a fact-finding hearing was a violation of due process.

Petitioners appealed. New York's Appellate Division, First Department affirmed. (App. at 11a.) In its order, the First Department failed to set forth standards for granting dismissal due to spoliation or to state from whence it derived the power to determine disputed issues of fact. First, the court explicitly rejected Mr. Kaufman's uncontroverted affidavit and deposition testimony that the discarded tapes were not related to the transaction. (App. at 8a-9a.) The First Department "easily inferred," as did the supreme court, that the discarded tapes contained recordings of relevant conversations, even though there was no proof that any discarded tape contained a recording of a relevant conversation. (App. at 8a.) The Proskauer partners who would have been parties to those alleged conversations had submitted affidavits, but in those affidavits, they failed to describe any alleged conversation sufficiently to show that the claimed conversation would have been relevant to the case. (N.Y.R. at AR2619-22; AR21-23; AR3769-89.)

Second, the First Department "inferred" that the destruction was done in bad faith, "an inference also circumstantially supported by the nature of [Mr.] Kaufman's conduct and timing." (App. at 9a.) The First Department reached these conclusions without reference to a hearing record and solely by reviewing Proskauer affidavits, which

petitioners had refuted. (N.Y.R. at AR21-23; AR2619-22.) The First Department failed to address the issue of a hearing and resolved the disputed facts against petitioners. (App. at 8a-11a.) The First Department concluded that petitioners' actions prejudiced respondents, although respondents failed to show how they were prejudiced.

Petitioners' surviving conflict of interest claim was later dismissed by the supreme court on Proskauer's subsequent summary judgment motion. The supreme court based its ruling exclusively on the same alleged spoliation of tapes. (App. at 23a-26a.) The Appellate Division again affirmed. (App. at 21a-22a.)

The New York Court of Appeals, in its discretion, dismissed petitioners' first motion for leave to appeal from the order that was final only as to Nomura, and later denied petitioners' second motion for leave to appeal from the final order in the case.[4] (App. at 27a-29a.)

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4. In determining not to hear petitioners' appeal, the Chief Judge of the New York Court of Appeals recused herself and took no part in the court's decision, ostensibly because her husband, Stephen Kaye, is a litigation partner at Proskauer. Since the Chief Judge's appointment to the Court of Appeals in 1993, Proskauer has appeared before the Court of Appeals approximately twenty (20) times, and the Chief Judge has taken no part in those cases. Petitioners submit that they, and each of the litigants involved in the other cases, were unfairly disadvantaged by the recusal and did not receive an appropriate appellate consideration, which constitutes a separate due process violation. Recusal of the Chief Judge, who is presumably among the most influential members of the Court of Appeals, on a regular basis, in all cases involving Proskauer, distorts the entire appellate process and deprives litigants of the participation of the Chief Judge to which they are entitled as a matter of fundamental fairness. A similar deficiency has been considered by this Court in formulating its own recusal policy. *See* The Supreme Court of the United States' Statement of Recusal Policy (Nov. 1, 1993); *see also*

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REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring question concerning what constitutes due process where a purported spoliator raises disputed issues of fact on a motion to dismiss due to alleged spoliation.

While this Court has never conclusively addressed the issue of spoliation, this due process question has divided and confused both federal and state courts and is ripe for this Court's review. There are no statutes or rules that apply exclusively to motions to dismiss due to alleged spoliation. There is no controlling case law clearly articulating uniform standards to guide lower courts regarding the need to conduct an evidentiary hearing when faced with disputed facts as to whether spoliation occurred. Nor is there settled authority advising whether and when disputed facts concerning alleged spoliation must be submitted to a jury, rather than determined by the court.

Consequently, case law on spoliation is inconsistent and cannot be reconciled, producing a hodgepodge of opinions by federal and state courts. The result of this jumble of decisions is, at its best, spotty compliance with minimum due process standards and, at its worst, a total failure to safeguard these constitutional rights. *Compare Silvestri v. General Motors Corp.*, 271 F.3d 583, 595 (CA4 2001) (Traxler, J., dissenting in part, concurring in part) (where the court failed to conduct an evidentiary hearing on a spoliation motion), *with West v. Goodyear Tire & Rubber*

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Microsoft Corp. v. United States, 530 U.S. 1301 (2000); and *Laird v. Tatum*, 409 U.S. 824 (1972). This problem becomes even more acute where the recusal has taken place on the initial motion for leave to appeal, which occurred here, as opposed to a decision on the merits of the case after it has been accepted by the court for a hearing.

Co., 167 F.3d 776, 779 (CA2 1999) (where the court conducted an evidentiary hearing before determining a spoliation motion).

The emotionally-charged nature of allegations of spoliation often creates a visceral response. Many courts appear to respond to such allegations by exceeding the bounds of their discretion. Rather than parse the facts and determine, in a manner that comports with constitutional mandates, whether any spoliation occurred, they rush to punish the alleged spoliator.[5] Courts should be able to respond to allegations of spoliation. But they must follow clearly delineated guidelines that are consistent with due process. This Court should grant review in this case because the circuit courts of appeals and the state courts of last resort have shown that they are not up to the task of establishing uniform minimum standards.

I. Spoliation Is a Recurring Issue Which This Court Has Not Addressed for Over 100 Years

This Court has not addressed the issue of spoliation since the 19th century. *See The Olinde Rodrigues*, 174 U.S. 510, 538-39 (1899); *The Pizarro*, 15 U.S. (2 Wheat.) 227, 241-42 (1817).

Recently, there has been an explosion of lawsuits involving allegations of spoliation in the federal and state courts. David A. Bell et al., *Let's Level the Playing Field: A New Proposal For Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 770 (Fall 1997). A Lexis search for case law concerning "spoliation" or the

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5. If the rulings in this case are left undisturbed, as one federal court noted, discarding irrelevant material will be a "strict liability discovery offense." *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 115 (D. Colo. 1996).

"destruction of evidence" in *either* federal courts *or* state courts is automatically terminated because it identifies over 1,000 cases responsive to the inquiry. One recent survey has shown that "50% of all litigators found spoliation to be either a frequent or regular problem." Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation As A Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993) (citing C.R. Nesson, *Incentives to Spoliate Evidence In Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991)). At the same time, practitioners have suggested that spoliation claims may be asserted "for the purpose of negotiating a favorable settlement" and may "be used increasingly as a litigation tactic." Laurie Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions For the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 707 (2000).

Not only has spoliation been raised in the courtroom, it has also been the subject of extensive commentary in treatises, legal publications, and the press. *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE (1989 & Supp. 2002); Joseph B. Rizzo, *Judicial Departments Differ On Application of Spoliation Motion When Key Evidence Is Destroyed*, 73-FEB. N.Y. ST. B. J. 40 (Feb. 2001); John T. Donovan & Joseph J. Hamill, *Sabers Continue to Rattle In the Evidence Spoliation Battle*, PROD. LIABILITY L. & STRATEGY, at 5 (Sept. 1996); Elisabeth Bumiller, *Enron's Collapse: The Overview; Enron Contacted 2 Cabinet Officers Before Collapsing*, N.Y. TIMES, Jan. 11, 2002, at A1; David S. Hilzenrath, *Data Destruction Intensifies Andersen's Woes*, WASH. POST, Jan. 11, 2002, at E-01.

The proliferation of cases involving spoliation has caused rapid changes in the law. Bell, *Let's Level the Playing Field*,

29 ARIZ. ST. L.J. at 771 (quoting JOHN W. STRONG, MCCORMICK ON EVIDENCE § 265 (4th ed. 1992)). Commentators have proposed that the Federal Rules of Evidence be amended to address the confusion spawned by the various remedies for spoliation that are haphazardly applied by courts nationwide. Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553 (1993); *see also* Brooks Morel, Note and Comment, *Now You See It, Now You Don't: A Georgia Perspective on Spoliation of Evidence*, 17 GA. ST. U. L. REV. 1163, 1183-85 (Summer 2001).

To date, eight states and the District of Columbia recognize an independent cause of action in tort for the intentional or negligent spoliation of evidence. GORELICK, DESTRUCTION OF EVIDENCE, Supp. § 4.4 (the eight states are: Alabama, Alaska, Florida, Illinois, Montana, New York, New Mexico, and Ohio); *see also Fada Indus., Inc. v. Falchi Bldg. Co.*, 189 Misc. 2d 1, 12 (Sup. Ct. Queens County 2001). New York also recognizes a common law remedy for spoliation of "key" or "crucial" evidence, which the courts apply pursuant to their inherent authority. *See DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53 (2d Dep't 1998).

Commentators agree that currently the "state and federal courts lack a uniform approach for dealing with spoliation of evidence . . . ." Bell, *Let's Level the Playing Field*, 29 ARIZ. ST. L.J. at 775; J. Brian Slaughter, *Spoliation of Evidence: A New Rule of Evidence is the Better Solution*, 18 AM. J. TRIAL ADVOC. 449, 449 (Fall 1994) (stating that spoliation remedies cause "much confusion . . . where different remedies have been applied to similar situations, and where judges have been allowed to mix and match elements from these various remedies"). One author concluded that "[i]t's reached the point where opposite results can be reached in

cases nearly identical in their factual scenarios depending on whether the case is tried in federal or state court." Hank Grezlak, *Federal, State Court At Odds On Spoliation*, PENNSYLVANIA LAW WEEKLY, Jul. 22, 1996, at 1 (noting that state courts are more likely to dismiss cases involving allegations of spoliation, while federal courts may impose sanctions but will probably permit the claims to survive). It follows that forum shopping, rather than the United States Constitution, affords alleged spoliators more protection.[6] *Compare Sonmez v. World on Columbus, Inc.*, 261 A.D.2d

6. Indeed, the individual petitioners, through their interests in another entity, have suffered from judicial inconsistencies. In the instant action, petitioners' claims were dismissed due to allegations that they spoliated tapes. In a separate action pending in federal court, an entity in which the individual petitioners here hold an indirect interest, was denied an opportunity to prove its claims due to its adversaries' destruction of key documents and the federal courts' refusal to impose any sanctions due to that alleged spoliation. *Compare Sage v. Proskauer*, 275 A.D.2d 11, 16-17 (1st Dep't 2000), *with John St. Leasehold, LLC v. Capital Mgmt. Res., L.P.*, 154 F. Supp. 2d 527, 541 (S.D.N.Y. 2001), *aff'd*, No. 01-6096, 2002 U.S. App. LEXIS 2348 (CA2 Feb. 13, 2002).

The *John Street* case involved claims arising out of the foreclosure of property owned by plaintiff John Street Leasehold LLC ("John Street"), a company in which petitioners Melvyn Kaufman and Robert Kaufman hold an indirect interest. 154 F. Supp. 2d at 536. A defendant bank officer, who was involved in determining whether to foreclose on the John Street property, admitted under oath that, while litigation was pending, he destroyed all of his reading and correspondence files and everything in his possession concerning the property. In determining whether to apply an adverse inference against defendants in *John Street*, the Southern District noted that the inference could apply when relevant evidence is destroyed intentionally, or in a grossly negligent manner. *Id.* at 541. The *John Street* court considered whether there was evidence that the destroyed documents were relevant to the material issues in the case and whether defendants had an obligation to preserve the documents at the time of destruction. *Id.* at 541.

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199, 199 (1st Dep't 1999), *with Gordon v. State Farm Ins. Co.*, 700 So. 2d 1117, 1119-20 (La. Ct. App. 1997).

While certain federal and state courts are failing to satisfy the minimum requirements of due process on spoliation motions, other federal courts have held that the more rigorous clear and convincing standard of proof must be met in establishing spoliation. *See Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995); *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at *103 (N.D. Ill. Oct. 20, 2000); *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 108 (D. Colo. 1996); *see also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505 (CA4 1977), *cert. denied*, 434 U.S. 1020 (1978). Because spoliation motions often involve "'allegations of fraud or some other quasi-criminal wrongdoing,'" the *Shepherd* court noted that requiring the movant to meet an elevated standard of proof would "'reduce the risk to [the party] of having his reputation tarnished erroneously. . . .'" *Shepherd*, 62 F.3d at 1477 (*citing Addington v. Texas*, 441 U.S. 418, 424 (1979)).

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In contrast, the Appellate Division in the instant action concluded that the discarded tapes were relevant based on an inference, not based on separate evidence of relevancy. The Appellate Division in this case also inferred from the circumstances of destruction that it was done in "bad faith." (App. at 8a-11a.) In *John Street*, the Southern District refused to impose any sanctions on defendants, and the Second Circuit affirmed. 154 F. Supp. 2d at 541 n.3; 2002 U.S. App. LEXIS 2348, at *7. Without these files, which were new evidence, or an appropriate sanction, John Street could not prove its case and summary judgment was entered against John Street and in favor of defendants. 541 F. Supp. 2d at 552, 541. Thus, the individual petitioners here have been deprived of the opportunity to prove claims in a lawsuit due to spoliation not once, but twice, as a result of the courts' inconsistent application of the law regarding spoliation.

In addition to addressing due process issues, courts must decide which matters raise issues of law that the court may determine, and which raise questions of fact that should rightfully be submitted to the jury. *Compare Minnesota Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (CA7 2001), *with Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (CA4 1995). Resolution of spoliation motions has resulted in satellite litigation that may "overwhelm the original litigation and [have] the potential to impose significant burdens on judicial administration." Kindel, *Spoliation of Evidence*, 27 WM. MITCHELL L. REV. at 706 (citing *Gates Rubber Co.*, 167 F.R.D. at 90). Spoliation motions touch upon evidentiary issues, discovery obligations, document retention policies, and access to electronic information and computer records.

Despite the prominence of spoliation as a recurring issue facing American jurists, there is no current spoliation decision of this Court. Because the law governing spoliation is evolving and the lower courts are crafting new remedies that have not been subjected to judicial scrutiny; because spoliation affects constitutional rights; and because spoliation case law is confusing, irreconcilable and lacking in uniform standards, this petition should be granted.

II. This Court Should Grant Review To Resolve A Split Of Authority Concerning Due Process Rights

This Court should grant review to resolve a well-developed conflict among the circuit courts of appeals and the state courts of last resort as to whether due process requires that an evidentiary hearing be conducted where disputed factual issues are raised on a motion to dismiss due to alleged spoliation. There exists a similar split of authority as to whether due process requires that facts relating to the adverse inference must be submitted to the jury or, at a minimum, determined by the court after an evidentiary hearing.

A. There Is A Split of Authority Regarding When Due Process Requires An Evidentiary Hearing

At least one circuit court of appeals has upheld an order dismissing plaintiff's claims due to spoliation of evidence where no evidentiary hearing was conducted to resolve the disputed issues of fact. *See Silvestri v. General Motors Corp.*, 271 F.3d 583 (CA4 2001). As in *Silvestri*, courts in Florida, Michigan, Nevada, New Jersey, and New York,[7] have dismissed causes of action, even where disputed issues of fact were raised, without conducting an evidentiary hearing. *See Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1015-16, 1018 (Fla. Dist. Ct. App. 2000); *Babe Elias Builders, Inc. v. Pernick*, 765 So. 2d 119, 119, 121 (Fla. Dist. Ct. App. 2000); *DeLong v. A-Top Air Conditioning Co.*, 710 So. 2d 706, 707 (Fla. Dist. Ct. App. 1998); *Tait v. Chrysler Corp.*, No. 178254, 1996 Mich. App. LEXIS 1491, *3-6 (Mich. Aug. 20, 1996) (unpublished); *Stubli v. Big D Int'l Trucks, Inc.*, 810 P.2d 785, 787-88 (Nev. 1991); *Weiss v. Connecticut Mut. Ins. Co.*, 287 A.D.2d 400, 401 (1st Dep't 2001); *Sonmez*, 261 A.D.2d 199, 199 (1st Dep't 1999); *Squitieri v. City of New York*, 248 A.D.2d 201, 203-04 (1st Dep't 1998); *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 176

7. Pursuant to New York State procedure, sanctions may be issued for the mere violation of a discovery notice. *See* CPLR 3126. Conversely, under Rule 37, a court may impose sanctions only if a litigant disobeys a previously issued court order. FRCP 37(b)(2)(C). Although federal courts may sanction conduct that is not violative of a court order based on their inherent authority, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991), on a spoliation motion in federal court, there often is a prior order determining what items are relevant. In contrast, on a spoliation motion in New York, it is likely that the first time issues regarding the relevancy of requested items are raised is on the motion to dismiss, after the alleged spoliation has occurred. In the instant action, when Mr. Kaufman discarded the irrelevant tapes, there was no court order requiring him to retain or produce any tapes, and certainly no order requiring him to retain or produce tapes unrelated to the transaction.

(1st Dep't 1997); and *Aetna Life & Cas. Co. v. Imet Mason Contractors*, 707 A.2d 180, 185-86 (Sup. Ct. N.J. App. Div. 1998).

Conversely, courts in virtually every other circuit and courts in several states have required that hearings be conducted before ruling on spoliation motions, or have submitted factual issues relating to spoliation to the jury. *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 216-20 (CA1 1982) (Breyer, J.); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779, 781 (CA2 1999); *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 137 (CA3 1997), *cert. denied*, 523 U.S. 1054 (1998); *Reddin v. Robinson Prop. Group, L.P.*, 239 F.3d 756, 759 (CA5 2001); *Austral-Pacific Fertilizers, Ltd. v. Cooper Indus., Inc.* Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS 5383, at *6-12 (CA6 Mar. 18, 1997) (unpublished); *Marrocco v. General Motors Corp.*, 966 F.2d 220, 221, 223-24 (CA7 1992); *Keefer v. Provident Life & Accident Ins. Co.*, 238 F.3d 937, 940-41 (CA8 2000); *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, No. 97-5089, 1998 U.S. App. LEXIS 2739, at *8, 22 (CA10 Feb. 20, 1998) (unpublished); *Gratton v. Great Am. Communications*, 178 F.3d 1373, 1375 (CA11 1999); *Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1472, 1484 (D.C. Cir. 1995); *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 84 (Al. 1989); *Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 7 (Az. Ct. App. 1997); *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 89 Cal. Rptr. 2d 353, 360 (Cal. Ct. App. 1999); *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000); *Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988); *Brown v. Hamid*, 856 S.W.2d 51, 55 (Mo. 1993); *Morris v. Rickel Home Cntrs.*, 27 Phila. 293, 296, 308-09 (Common Pleas Ct. Phila. County 1993).

Following New York precedent, the New York supreme court in this case wrote that "'[p]laintiffs were not entitled

to a fact-finding hearing to determine the nature of [the] documents they wrongfully discarded.'" (App. at 16a (quoting *Sonmez*, 261 A.D.2d at 199).) The supreme court so held even though the affidavits and deposition testimony submitted by Proskauer and petitioners raised issues of fact as to whether, excluding the records of the nineteen taped telephone conversations petitioners did produce, any other relevant telephone conversations concerning the transaction occurred and were taped. (N.Y.R. at AR307-317; AR1645-1888; AR3121-59; AR2619-22; AR21-23; AR2713-54.) This was a gross violation of due process.

The Court of Appeals for the Sixth Circuit succinctly stated the rationale for conducting a hearing:

> when there is a factual dispute as to whether actual prejudice has resulted from a loss of evidence, the trial court should allow the plaintiffs an opportunity to rebut the presumption against them before determining what sanction is appropriate. The legal system's reluctance to resort to dismissal of an action, both under federal and Ohio state law, mandates that the court gather all relevant facts before imposing so extreme a sanction.

Austral-Pacific Fertilizers, 1997 U.S. App. LEXIS 5383, at *12 (citation omitted); *Litton Sys., Inc. v. Ssangyong Cement Indus. Co.*, Nos. 96-1034, 96-1047, 1997 U.S. App. LEXIS 2386, at *18-19 (Fed. Cir. Feb. 13, 1997) (unpublished); *Shepherd*, 62 F.3d at 1472.

Moreover, in a series of cases not involving spoliation, this Court has opined that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe*

Internationale Pour Participations Industrielle et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) (citing *Hovey v. Elliott*, 167 U.S. 409, 413-14 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-51 (1909)). In *Societe Internationale*, this Court applied its holdings in *Hovey* and *Hammond*. *Societe Internationale*, 357 U.S. at 209-10. In *Hovey*, this Court concluded that striking defendants' answer, without a hearing, because defendants had been held in contempt for violating a court order was a denial of due process. *Hovey*, 167 U.S. at 413-14. In contrast, in *Hammond*, this Court held that striking defendant's answer was not violative of due process because defendant, after an opportunity to be heard, had been ordered to produce documents in its possession and had failed to do so. *Hammond*, 212 U.S. at 337-40.

Petitioners submit that the holdings in *Societe Internationale*, *Hovey*, and *Hammond* turn on the due process rights to a fact-finding hearing. In the Fourth Circuit, Florida, Michigan, Nevada, New Jersey, and New York, litigants accused of spoliation, including petitioners here, have been denied the opportunity to establish at an evidentiary hearing facts relating to spoliation, including whether spoliation ever occurred or, if it did, whether it was done in bad faith. *See Silvestri*, 271 F.3d at 589-94; *Torres*, 762 So. 2d at 1016-18; *Babe Elias Builders*, 765 So. 2d at 120-21; *Tait*, No. 178254, 1996 Mich. App. LEXIS 1491, *3-6; *Stubli*, 810 P.2d at 787-88; *Weiss*, 287 A.D.2d at 401; *Sonmez*, 261 A.D.2d at 199; *Squitieri*, 248 A.D.2d at 202-04; and *Aetna*, 707 A.2d 185-86. Lacking a clear record of the facts regarding spoliation, in these jurisdictions, courts are dismissing claims "without affording a party the opportunity for a hearing on the merits . . ." as due process requires. *Societe Internationale*, 357 U.S. at 209. This Court should grant certiorari to clarify that the *Societe Internationale*, *Hovey* and *Hammond* holdings relating to due process rights apply with equal force to spoliation motions.

B. There Is A Split of Authority As To When The Adverse Inference Should Apply

In this case, the New York courts refused to conduct a fact-finding hearing to satisfy the dictates of due process and, instead, misapplied the adverse inference as an apparent substitute for due process. (App. at 1a-20a.) This faulty application of the adverse inference denied petitioners their due process rights to a hearing. The errors of the New York courts provide a stark example of the confusing state of the law relating to the adverse inference, which is frequently used as a remedy on spoliation motions.

When employing the adverse inference, many courts instruct the jury that, should it find that the alleged spoliator discarded relevant information, then it may draw an inference that the destroyed items were adverse to that alleged spoliator. *Nation-Wide*, 692 F.2d at 216; *JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 50-51 (CA1 1999); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155-57 (CA4 1995); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1135-36 (CA7 1987), *cert. denied*, 485 U.S. 993 (1988); *Burris v. Kay Bee Toy Stores*, C.A. No. 96C-01-036, 1999 Del. Super. LEXIS 536, at *2-3 (Del. Super. Ct. Sept. 17, 1999); *McLain v. Taco Bell Corp.*, 527 S.E.2d 712, 715-19 (N.C. Ct. App.), *review dismissed*, 221 S.E.2d 564 (2000); *Estate of Holmes v. Boyle*, 56 P.2d 1333, 1335-36 (Colo. 1936); *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 Mass. Super. LEXIS 240, at *27-33 (Mass. Super. Ct. June 15, 1999); *DiLeo v. Nugent*, 592 A.2d 1126, 1131-32 (Md. Ct. Spec. App.), *cert. granted*, 599 A.2d 90 (1991).

In contrast, other courts refuse to draw an inference at all, even though there is evidence that relevant information was destroyed. *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 558-59 (CA7 2001); *Minnesota Mining & Mfg. Co.*,

259 F.3d at 606 n.5; *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (CA3 1995); *Milbourn v. Marriott*, CA No. 94-35142, 1995 U.S. App. LEXIS 26711, at *5-6 (CA9 Sept. 15, 1995) (unpublished); *Akiona v. United States*, 938 F.2d 158, 160-61 (CA9 1991), *cert. denied*, 503 U.S. 962 (1992); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96-99 (CA3 1983); *Rodriguez v. Schutt*, 896 P.2d 881, 883, 885 (Co. Ct. App. 1994), *cert. granted*, 914 P.2d 921 (Colo. 1995), *aff'd in part, rev'd in part on other grounds*, 914 P.2d 921 (Colo. 1996).

Still others have held that the court, not the jury, may determine the facts relating to the alleged spoliation. *See Caparotta v. Entergy Corp.*, 168 F.3d 754, 756 (CA5 1999) (reversing a jury verdict for plaintiff and remanding for a new trial because plaintiff presented evidence to the jury of defendant's inadvertent destruction of documents); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (CA1 1988) (denying plaintiff's motion for a new trial and remanding for an evidentiary hearing before the court, not the jury, to determine the effect of defendant's failure to produce a report relevant to plaintiff's case, which plaintiff discovered for the first time after trial and after entry of judgment for defendant), *on remand*, 127 F.R.D 1 (D. Mass. 1989), *cert. denied*, 498 U.S. 891 (1990).

Furthermore, it is not settled what conduct warrants imposition of the adverse inference and submission to the jury of the facts relating to the inference. For example, the Second Circuit Court of Appeals has held that the adverse inference should apply when relevant material was destroyed intentionally, *Kronisch v. United States*, 150 F.3d 112, 126-28 (CA2 1998), or due to gross negligence, *Reilly v. NatWest Mkts. Group, Inc.*, 181 F.3d 253, 267 (CA2 1999), *cert. denied*, 528 U.S. 1119 (2000), or in bad faith. *Cf. Altschuler v. University of Pa. Sch. of Law*, No. 99-7423, 1999 U.S. App. LEXIS 34303, at *7 (CA2 Dec. 27, 1999), *cert. denied*, 530 U.S. 1276 (2000) (unpublished); *West*, 167 F.3d at 779 (citations omitted). But

the Second Circuit recently implied that the district court may provide an adverse inference instruction to the jury even in the *absence* of a finding of intentional, grossly negligent or bad faith destruction. *See MacFarlane v. Canadian Pacific Ry. Co.*, 278 F.3d 54, 63 (CA2 2002). In *Macfarlane*, the Second Circuit noted that it "should be enough to show that [defendant] had control of the [missing item] at the relevant times, that the evidence was available and that [defendant] failed or refused to produce this evidence." *Id.* (citations omitted).

The rules applied by other circuit courts as to what conduct justifies applying the inference are similarly in conflict. *See Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (CA10 1997) (holding that an adverse inference must be predicated on bad faith and mere negligence is not enough); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329-30 (CA9 1993) (reversing and remanding because the ambiguous jury instruction might have caused the jury to believe that a finding of bad faith was a prerequisite to drawing an adverse inference).

Thus, there is no clear statement of the law regarding the adverse inference. It is impossible to state with certainty when the adverse inference applies, what conduct triggers the use of the inference, or whether the court or the jury should determine the disputed facts.

These conflicts concerning the due process implications of the fact finding hearing and the adverse inference are ripe for resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

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